

Eschenbach-Boysa Management Company, Inc., Eschenbach-Boysa Management Company of Waukesha, Inc. and Hotel Employees and Restaurant Employees International Union, Local No. 122, AFL-CIO, Petitioner. Case 30-RC-4143

17 January 1984

**DECISION ON REVIEW AND
DIRECTION**

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Hearing Officer Paul Bosanac of the National Labor Relations Board. Following the close of the hearing the Regional Director for Region 30 issued a decision. Thereafter, the Employer filed a request for review of the Regional Director's decision and brief in support thereof and the Petitioner filed briefs in support of the Regional Director's decision.

On 20 July 1982 the National Labor Relations Board by telegraphic order granted review as to the appropriateness of the unit.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. They are affirmed. Additionally, the Board has reviewed the record in light of the request for review and briefs, and adopts the Regional Director's findings and recommendations.

The Employer consists of two franchise restaurants located respectively in Milwaukee and Waukesha, Wisconsin. The Petitioner seeks to represent the employees at the Milwaukee location. The Employer asserts that the appropriate unit should include both stores.

The Employer's restaurant in Milwaukee opened in July 1979 and the restaurant in Waukesha in March 1981. The restaurants are 20 miles apart and each employs about 25 employees. Each restaurant is a separate corporation. Lee Martin Eschenbach owns 50 percent of the stock in each corporation. Steve Boysa owns the remainder of the stock in the Waukesha restaurant and 34 percent of the stock in the Milwaukee location. Bill Heilen owns the remainder of the stock in the Milwaukee location. A central business office for the Employer is at a separate location in Milwaukee.

¹ The Board has been administratively advised that an election was conducted on 23 July 1982 in the unit found appropriate by the Regional Director and the ballots were impounded.

The two restaurants have identical menus, food prices, and hours of operation and are promoted through the same advertising. One workmen's compensation policy covers both locations and employees at both restaurants receive the same insurance and vacation benefits and the same 50-percent discount on food purchased prior to the employee's shift. Wage ranges are similar (\$2.01 to \$4.50 per hour at the Waukesha restaurant and \$2.01 to \$5 per hour at the Milwaukee restaurant) and employee classifications are identical except that Milwaukee has two quality control supervisors and Waukesha has none. Employees in the various classifications have the same duties, the same paydays, and the same probationary period. Seniority accrued at one location is honored at the other location. All personnel records are kept on the premises of the respective restaurants and each restaurant has a separate payroll and timecards.

Managerial responsibility is split between Eschenbach and the two managers employed at each store. In addition to spending 3 days a week at each store, Eschenbach calls the managers at the store where he is not present three to six times a day. Eschenbach makes the major managerial decisions concerning the restaurants such as setting menus and choosing vendors and also decides the number of people to be hired. Additionally, Eschenbach sets pay rates and overall terms and conditions of employment. Although the managers do most of the training of employees, when Eschenbach decided to alter the meatcutting technique at the restaurants, he personally taught the employees the new technique. Similarly, when a fruit bar was added to the salad bar, Eschenbach showed the employees how to set up and maintain it. Appeal to Eschenbach constitutes the third step of the grievance procedure, although employees do call him directly at home or at the other restaurant concerning their problems.

The managers solve employee problems and complaints and grant time off. The managers make up the employee work schedules although such schedules must be reviewed and approved by Eschenbach. Significantly, the managers interview job applicants and can and have hired employees on their own. They may discharge an employee for a severe violation of company policy such as intoxication or threatening violence but otherwise must obtain Eschenbach's approval before firing an employee. As to such terminations that require Eschenbach's approval, the managers make effective recommendations. Occasionally, the managers recommend employee promotions and raises but most often they are initiated and determined by Eschenbach based on his own observation. The managers

do much of the training of the employees, often using materials provided by the franchising company.

The managers determine the quantity of goods to order based on the previous week's volume. They can reject merchandise if it does not meet the specifications of the order. Once or twice a week, uniforms, small equipment, or food is transferred between the two restaurants to relieve temporary shortages.

There is evidence that the managers rotate between the two restaurants for training purposes and to cover vacations and time off. However, there is virtually no evidence of transfer of employees. There have been no permanent transfers and three temporary transfers since the second location was opened in March 1981. Two of these transfers were in order to assist in opening the new restaurant. The third transfer involved emergency help for one evening.

We agree with the Regional Director's conclusion that the two corporations are a single employer and as such the broader two restaurant unit could be an appropriate unit. However, as the Regional Director also finds, we conclude the Employer here has not rebutted the presumption of appropriateness attaching to the single restaurant unit. The restaurants here are 20 miles apart and there is virtually no interchange among their employees. Eschenbach does not make daily visits to both locations and therefore, although he reserves for himself many management prerogatives, he necessarily must leave many of the day-to-day decisions concerning the restaurants to his managers. These managers, *inter alia*, interview and hire employees, grant time off, and resolve employee problems and complaints. It thus appears that the employees at the Milwaukee restaurant have a separate community of interest. There is no history of bargaining in a broader unit. In view of all of the foregoing we find that the employees employed at the Milwaukee restaurant constitute a separate appropriate unit.²

DIRECTION

It is directed that the Regional Director for Region 30 shall, within 10 days from the date of

this Decision on Review and Direction, open and count the impounded ballots cast in the election held 23 July 1982, and thereafter prepare and serve on the parties a tally of ballots, on the basis of which he shall issue the appropriate certification.

MEMBER HUNTER, dissenting:

I cannot agree with my colleagues that a single restaurant unit here is an appropriate unit. In my view, the administration of the restaurant is so highly centralized in the person of Lee Martin Eschenbach that the single location unit presumption is rebutted.

It is clear from the record that Eschenbach is either present at or in touch with both restaurants every day. Eschenbach sets the terms and conditions of employment for both restaurants and they are virtually uniform throughout. To the extent that the managers exercise any autonomy, it concerns matters that are largely routine and is exercised consistent with preset guidelines. Although personnel records of the two establishments are kept separately as required by law, Eschenbach is a consistent and important factor in virtually all personnel actions with the possible exception of the initial hiring of employees. Thus, Eschenbach must be consulted about all scheduling and discharges (except in egregious cases), generally initiates all raises and promotions, and is frequently involved with problems and grievances even at their initial stages. Eschenbach often decides to transfer equipment and food between the two restaurants and has on several occasions transferred employees from one restaurant to the other. Indeed, one employee was transferred for a period of 6 months to a year when the second restaurant opened. Moreover, there is evidence that the managers rotate between the two restaurants to accommodate training needs, vacations, and time off.

In my view then, the employees at the Milwaukee restaurant simply do not have a separate community of interest in any meaningful way.¹ Since the Petitioner has agreed to go to an election in the larger unit if that is deemed the only appropriate one, I would direct an election in a unit consisting of the Employer's employees at its restaurants in both Milwaukee and Waukesha.

² *Big Y Foods*, 238 NLRB 860 (1978), relied on by our dissenting colleagues, varies from the facts in this case in several important respects, and therefore does not control our decision here. In *Big Y*, the local managers had no authority to mete out discipline on their own, except for occasional oral reprimands. They had authority to resolve only the most minor employee complaints without referring them to the employer's central officials. The local managers there were not involved in employee evaluation. In short, the managers here possess far more authority to control or affect labor relations policy than did the local managers in *Big Y*.

¹ See, for example, *Big Y Foods*, 238 NLRB 860 (1978), where the Board found a single location unit inappropriate. There interchange was also limited, but, as here, the local managers' autonomy was greatly circumscribed.